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Supreme Court of the United States

OCTOBER TERM, 1940

HARRIET K. MOON, *Petitioner*,

vs. || No. 123

HOME LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, *Respondent*.

HARRIET K. MOON, *Petitioner*,

vs. || No. 124

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, a Corporation, *Respondent*.

BRIEF IN OPPOSITION TO AWARD OF WRITS OF CERTIORARI.

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I

The judgments which this court is asked to review ~~is~~ are found in the opinion of the United States Circuit Court of Appeals, Fourth Circuit, which is reported in 110 Fed. (2d) 184. Also, the opinion appears at pages 248-256 of the transcript of the record.

II

Although the two cases set forth in the caption are separate and distinct and a petition for writ of certiorari in each has been filed, we deem it appropriate, for the convenience of the court, that only one brief in opposition to the granting of the writs be filed; for the reason that, while the record in each case has been filed, the record in

the Mutual Benefit case (No. 124) is skeleton in form and contains, substantially, only the pleadings, orders, notice of appeal, docket entries, petition for rehearing, etc., applicable thereto, and certain other orders and papers, such as the judgment and opinion of the Circuit Court, which latter are also contained in the record in the Home Life case (No. 123). The record in the Home Life case, in other words, is complete for purposes of the consideration of the petitions in both cases. It contains the contracts sued on in each case, all of the evidence (the cases having been tried together in the District Court), and the judgments of the Circuit Court which are embodied in one opinion. At page 36, transcript of the record in the Mutual Benefit case, appears the stipulation of counsel to the effect that the transcript of the evidence appearing in the transcript of the record in the Home Life case shall be used and read in the Mutual Benefit case.

III

We deem it necessary that we include herein a concise narrative statement of the material facts shown in evidence. It will be noted that in doing so we first set forth the evidence of the petitioner (plaintiff in the trial court) and follow with the evidence of the respondents (defendants in the trial court); for the reason that it is important, as will appear hereinafter, for the court to observe just what evidence was produced by the petitioner in the trial court before resting her case, and that the evidence of the respondents was not in conflict therewith but merely supplemented the evidence of the petitioner upon the question of the suicide of the decedent.

1. Evidence of petitioner (plaintiff):

The two policies or accidental death benefit contracts of the Home Life Insurance Company are identical (Tr. pp. 19-34). The particular provision in each under which accidental death benefit is claimed (Tr. pp. 24, 32), reads as follows:

"Home Life Insurance Company, of New York, will pay under this contract * * * Five Thousand Dollars, upon receipt at the Home Office of the Company in the City of New York of due proof of the death of the insured and that such death occurred * * * and resulted solely from bodily injury caused by external means of an accidental or violent nature * * * and as a result thereof exclusive of all other causes; Provided, however, and this contract is made upon the express condition, that the Company shall incur no liability hereunder if death of the insured shall result * * * from self-destruction whether sane or insane."

The policy of the Mutual Benefit Health & Accident Association (Tr. pp. 36-40) is an accident policy. The provision under which benefit is claimed (Tr. p. 36) reads as follows:

"* * * Mutual Benefit Health and Accident Association * * * does hereby insure * * * Charles C. Moon * * * against loss of life, limb, sight or time, resulting directly and independently of all other causes, from bodily injuries sustained during any term of this policy through purely Accidental Means (Suicide, sane or insane, is not covered), and against loss of time beginning while this policy is in force and resulting from disease contracted during any term of this policy, respectively, subject, however, to all the provisions and limitations hereinafter contained. * * * If the insured shall sustain bodily injuries as described in the Insuring Clause, which injuries shall, independently and exclusively of disease and all other causes, continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay:

For loss of Life $5,000.00
* * *"

Shortly before four o'clock on Monday afternoon, July 11, 1938, Mrs. Moon discovered the body of her husband and notified a neighbor (Tr. p. 48). The police were notified and arrived at something near four o'clock (Tr. p. 49). The body had not been disturbed. It was lying in the lily pond, lengthwise, with the head in a northerly direction and the feet toward the south. Deceased was on his back and the entire body submerged in water except a part of the nose, a small portion of the chest and the knee-cap of one leg. One arm was in a horizontal position by the side of the body and the other arm was across the chest. Other policemen arrived within a few minutes. (Tr. pp. 56-59.) The pool is directly back of the residence building. It is 85½ inches in length; 57 inches in width; and 22½ inches deep (p. 56). There was a portable concrete step in the pool, in the southerly end of the pool, somewhat east of the decedent't feet, the feet being near the southerly center of the pool, the head of the body being in the opposite corner of the pool. There was found a fresh chip off this step on the side of the wall, *not* in the pool. Decedent was lying on his back and his hat floating on the water. The body was removed to an undertaking establishment before the Coroner arrived. (Tr. 56-59.) There was a superficial scratch over the left eye and a cut on the back of the head, about two and one-half inches long extending from the crown of the head towards the left ear, its depth being to the skull (Tr. pp. 84-86). Near the east wall of the pool (about two and one-quarter inches therefrom) and near decedent's head, there was a galvanized pipe—drain pipe—which protruded from the bottom of the pool about three inches (Tr. pp. 60-64). This pipe was sealed. At the west side of the pool, near the north end, on the ground about twelve inches from the side of the pool, there was a whiskey bottle containing a small amount of whiskey—the bottle perfectly clean indicating it had been there only a short time (Tr. pp. 61, 64-65).

The drain pipe was sealed and there was no drainage from the pool except through a crack in the concrete so there was some leakage (Tr. pp. 66-67, 144). And at the time of the first examination of the body (on Monday evening) the pool did not contain as much water as at the time Mr. Moon drowned. On Sunday evening the pool was at a level of about sixteen or seventeen inches with the water running into the pool (Tr. pp. 150-151).

The County Coroner, a physician, saw the body sometime after it had been removed from the pool. He gave it as his opinion that Mr. Moon probably had been dead since five o'clock or six o'clock in the morning (Tr. pp. 83-84); also that there was a very shallow cut over the left eye and a gash to the skull two and one-half inches long on the back of the head on the lower edge of which gash there was a bruise. The skull was not fractured (Tr. pp. 84-87). The gash wound was sufficient to cause unconsciousness (Tr. p. 89). The immediate cause of death was drowning (Tr. p. 91). Somebody told the Coroner that decedent had left a note or letter and he called upon Mrs. Moon who turned the note over to him, the same being torn into small pieces so that it had to be pieced together in order to be read (Tr. p. 91).

The evidence of Jackie Moon, son of decedent, aged eleven years, begins at p. 99, transcript. His father came home on the morning of his death about five o'clock. Jackie was awakened by the front door knocker and went down stairs and let his father in. They did not speak. Jackie then went upstairs and back to bed—in bed with his mother. Jackie arose about eight-thirty, went down stairs, and into the front room, and found an envelope on the table by the davenport addressed to his mother. By that time the mother was coming down the stairway. He gave the envelope to her. She said nothing. She was going to throw it away or burn it without reading it, but she did read it

and then tore it up. The father sometimes drank but Jackie was too sleepy to say whether he was drinking that morning (Tr. pp. 100-102).

After Jackie had opened the front door for decedent and had gone back to bed, the latter came up to the mother's room. Both Mrs. Moon and Jackie were awake but no word was spoken. Mr. Moon sat down, took off his hat and almost immediately left the room and left the house, as above (Tr. pp. 104-105).

The testimony of Mrs. Moon, this petitioner, begins at p. 105, transcript:

She heard her husband arrive in his automobile. After Jackie went down and let him in the front door Mr. Moon came up to her room. She admits no words were spoken and that in a little while Mr. Moon left by the front door. She knew he did not take the car. When she went down stairs about eight-thirty Jackie handed her the note. She looked for a match with which to burn it before reading it—she thought something ugly would be in it—but Jackie influenced her to read it. After fully identifying the note, petitioner produced it in evidence. (Tr. pp. 106-109.) The note (Tr. p. 110) reads as follows (the capitals shown are as per the note and the words "an accident" were underscored):

"7/9/38

"Harriet—

"I've heard your estimate of me to others. Of course, a man can't get a long way with that kind of publicity from his wife. You've made it impossible for me to go on. I hope and trust you'll be happy with me out of the way. BUT PLEASE try to be a wife, instead of a nag, to your next husband. Don't drive him to desperation, too.

"You'd better destroy this note for anything that happens must be *an accident*. REMEMBER THAT! It'll make a lot of difference in your insurance. That ought to keep you quiet for money means more to you than anything else, and the knowledge of this note would mean that you would collect about $5,000.00 less insurance. $5,000.00 ought to keep your mouth shut, but it's up to you.

"I'm sorry. We could have been happy together, if only you could have been a little more cooperative instead of so commanding and domineering. But the last straw was when I heard you belittling me to our friends.

"I've loved you, Harriet, all along, but you've made it impossible for me to go on. Again I hope you'll be happy now. C. C."

About eight-thirty on Saturday evening, July 9th, Mr. and Mrs. Moon had a quarrel. A Mr. Thacker lived in the apartment over the garage just back of the Moon residence. After the quarrel above referred to Mrs. Moon went to the apartment. Still later Mr. Moon came to the door of the apartment and told Mrs. Moon that he was going down town. He then got into the car and went out the driveway. Apparently, however, he did not leave the premises at that time because Mrs. Moon and Mr. Thacker had a conversation about screens for the apartment windows, or doors, during the course of which Mrs. Moon referred to Mr. Moon as a "high-flier." Whether Mr. Moon heard this or not is not shown, but Mr. Moon yelled up to the apartment at Mrs. Moon and she says that, while she does not know what she had said about Mr. Moon in the conversation with Mr. Thacker, Mr. Moon acted like he had heard "something a whole lot worse" (Tr. pp. 111-112). Still later Mrs. Moon left the apartment and went over to close her house and found Mr. Moon sitting in the front room. He and Mrs. Moon had some conversation but the latter

is very vague as to what was said. Mr. Moon had a note book in his hand and he "folded that together" and put it in his pocket and said he was going "on a party." She says Mr. Moon was mad, that he got up and went out of the house and that she followed him "clear out to the street," her object being to "get him out of the mood he was in." He then left the premises angry (Tr. pp. 113-114).

Over objection, Mrs. Moon was permitted to say that previously she had found a similar note written by Mr. Moon. She was pressed as to when this was and finally said "well, it wouldn't be more than two months." Her counsel had suggested a month or two and at the suggestion of the court she was asked to be more specific and she answered "well, it was a month or month and a half," and then she added "well, how about calling it a month? Would that be all right?" (Tr. pp. 126-127). She found this note either in the waste paper basket or down beside the kitchen sink (Tr. p. 129). Over objection, Mrs. Moon was permitted to say that on the same day she found the last mentioned note Mr. Moon told her he would commit suicide. Her counsel then again pressed her to fix the time and she said (as formerly, above) "well, would a month be all right?" On this occasion she says Mr. Moon took her in his arms and said that if anything happened to him it must be an accident. (Tr. p. 141).

About four o'clock on Monday afternoon Mrs. Moon went to look at the pool because the pool had been leaking—she kept the water running all the time—and found the body of Mr. Moon (Tr. p. 143-144).

Mrs. Moon's cross-examination begins on p. 148, transcript:

Mr. Moon was five feet and nine inches tall and of medium slender build (p. 149). Mrs. Moon undertook to keep the water in the pool at a level of sixteen or seventeen

inches. On Sunday afternoon the level of the water was about six inches or seven inches from the top of the pool (Tr. p. 151), and the pool had a depth of twenty-two and one-half inches (p. 56). The water was running into the pool on Sunday afternoon. It was off on Monday afternoon when she discovered the body (Tr. p. 151).

After Mrs. Moon and her son had read the suicide note she tore it into bits and threw the pieces into the garbage sack in the kitchen. Later she and a neighbor recovered them and pieced them together at the suggestion of the latter (Tr. p. 152).

Several people, including the family, were in the front room on Sunday. Mrs. Moon was in there and presumably the children; also visitors. These visitors and the family ate supper in that room. (Tr. pp. 152-153).

Mr. Moon, after leaving on Saturday evening after the fuss between him and Mrs. Moon, remained away all of Saturday night, all of Sunday and Sunday night (Tr. p. 153).

2. Evidence of respondents (defendants):

Mr. Moon carried several policies of insurance. He carried an accident policy in the Mutual Benefit Health and Accident Association the premiums whereon he paid quarterly, the last premium having been paid on June 1st, 1938 (Tr. pp. 164-165). He carried two policies on his life in the Home Life company in the sum of $5,000.00 each, attached to which were the accidental death benefit contracts involved herein. Settlement under the two life policies was made after Moon's death. The premiums, amounting to $146.10 on each policy, were payable annually on October 25th. The last payment of premium was made in October and November, 1937, Mr. Moon having paid $51.57 in cash and borrowed against the policies the

residue. He had borrowed previously against the policies. On June 7, 1938, thirty days before his death, he again borrowed on the policies by which the full loan value was exhausted. There would have been no value in the policies for the payment of premiums on October 25th, 1938. (Tr. pp. 166-169). Mr. Moon also carried policies in the Pacific Mutual Life Insurance Company and had been paying the premium on a monthly basis of $12.84. A monthly payment was due to be made on July 9th (Moon died on the 11th) in order to extend the insurance for an additional month. After banking hours on the 9th (Saturday) Mr. Moon gave a check covering this extension (Tr. pp. 170-172).

Until February 28, 1938, Mr. Moon had been employed by the Koppers Coal Company since late 1927 or early 1928. He was merchandise manager of the company stores with offices in the City of Huntington, West Virginia. His salary was $450.00 per month except during the last year during which his salary was $405.00 per month. As of February 28, 1938, Mr. Moon was discharged for "increasing inattention to duties", is the first reason given. However, he was paid his salary for March and April. On Friday preceding his death he applied to his former employer for a loan and was told there was "no chance" of his being granted a loan. In seeking this loan Mr. Moon represented that he would need money "to carry him over". (Tr. pp. 180-185.)

On July 11th, 1938, the day of his death, Mr. Moon had a balance of four cents in bank. On June 4th he had a balance of $125.00. Between July 1st and July 11th his largest balance was $1.04. During the period his checks were returned unpaid on account of insufficient funds. Thirteen checks were thus returned from June 22nd to July 9th and his bank balance was absorbed by the charges for these returned items. Other checks were presented to the bank and returned unpaid, for which no charge was

made because the balance would not admit of a charge. By letter of July 10th Moon enclosed to the bank for deposit the sum of $14.00 in currency which he directed should be applied to the payment of the Pacific Mutual premium check which would extend his policies in that company for thirty days from July 9th. (Tr. pp. 189-193.) This deposit was received by the bank on the 12th (p. 197). The ledger sheet showing Mr. Moon's account in the bank appears at pp. 196-197. With the exception of the $14.00 deposit and a deposit on June 20th of $41.00 no deposits were made after June 10th. Subsequent to losing his job he made sundry small deposits (pp. 195-197). It will be noted that he lost his job on February 28th but was paid salary for March and April and that he borrowed from the Home Life on his insurance on June 7th (Tr. pp. 185, 168).

At four-thirty o'clock on the morning of his death, Mr. Moon was in the Florentine Cafe, down town (p. 201). After midnight on that day, and until four-thirty, he was in a gambling house engaged in gambling (Tr. 203-204, 210). He was at the same place on Saturday night or Sunday morning (the 10th) gambling (p. 219). He got a check cashed for $20.00 which was returned by the bank unpaid (Tr. p. 204). While the check was returned because the maker was deceased, his balance in bank was four cents (p. 197). On June 17, 18 and 20 Mr. Moon negotiated three checks aggregating $40.00 which were returned by the bank unpaid (Tr. p. 212).

IV

After the petitioner had introduced all of her evidence and rested her case, the respondents moved the court to direct a verdict for the Home Life Insurance Company in the one case and for the Mutual Benefit Health & Accident

Association in the other, assigning grounds therefor; which motions the court overruled and the respondents, respectively, excepted (Tr. pp. 163-164).

Again, after all of the evidence had been introduced by both the petitioner and the respondents, the respondents again moved the court to direct a verdict, as above, assigning grounds therefor; which motions again the court overruled and the respondents excepted (Tr. pp. 230-231).

The jury returned a verdict against respondent, Home Life Insurance Company for the sum of $10,000.00 and judgment was entered thereon (Tr. pp. 12-13).

The jury, also, returned a verdict against the Mutual Benefit Health and Accident Association for the sum of $5,000.00 and judgment was entered thereon (transcript of the record in Case No. 124 at pp. 12-13).

Within ten (10) days, under rule 50 of the Federal Rules of Civil Procedure, each respondent moved the court to set aside the verdict and any judgment thereon and to enter judgments for respondents (Tr. pp. 12-13).

Upon appeal by these respondents, the Circuit Court held that the controlling facts are conclusive that the insured's death was due to suicide; and the judgment in each case was reversed with direction to the District Court to enter judgment in favor of these respondents, respectively (Tr. pp. 248-256).

V

As we understand the rule, review on writ of certiorari is a matter of judicial discretion and will not be granted, in cases such as these, unless the Circuit Court has decided an important question of local law in a way probably in conflict with applicable local decisions. Petitioner bases

her contention, that writs should be granted to review these judgments, upon that proposition. In support thereof, counsel assert that, the policies involved being West Virginia contracts, the Circuit Court failed to apply the local law, as interpreted by the court of last resort of that state, in the several particulars set forth in the petitions herein. We controvert that proposition and believe that we will be able to demonstrate that the judgments herein are in exact harmony with the general law of West Virginia.

In actions upon insurance contracts such as these—upon double indemnity contracts and accident policies, imposing liability upon the insurer only in case of accident—(1) there is no presumption against suicide; (2) it may or may not be an affirmative defense with the burden of proof upon the insurer; and (3) suicide is not required to be established to the exclusion of every reasonable hypothesis consistent with death by accident; and (4) in every law action where the evidence is such that the court would be impelled to set aside a verdict adverse to such evidence, it is the duty of the court, as a matter of law, to direct a verdict in conformity with such evidence. Such is the law in West Virginia. Therefore, our position may be stated as follows:

1. The evidence of the petitioner, augmented by the evidence of respondents which is in harmony and not in conflict with the evidence of the plaintiff, explains the cause of death to have resulted from suicide and not by accident; and,

2. The foregoing being a correct statement from the record, it was the duty of the court, as a matter of law, to direct a verdict in favor of the respondents, respectively; there remained no issue for jury determination.

VI

The action against the Home Life Insurance Company was brought by the beneficiary (petitioner here) to recover, upon the theory of the accidental death of the insured, her husband, the principal sum of $5,000.00 under each of two (2) several double indemnity contracts which, by their terms, impose liability upon the insurer only in case the insured shall have come to his death solely from bodily injury caused by external means of a violent or accidental nature; but upon condition that in no event shall there be liability if death shall occur from self-destruction whether sane or insane.

The action against the Mutual Benefit Health and Accident Association was brought by the beneficiary (petitioner here) to recover, upon the theory of accidental death of the insured, her husband, the principal sum of $5,000.00 under an accident insurance policy which by its terms imposes liability upon the insurer in case of the death of the insured resulting directly and independently of all other causes from bodily injuries through purely accidental means, suicide, sane or insane, excepted.

These cases were tried together upon pleadings and proof, a jury having been impaneled to try the issues of fact.

The respondent in each case pleaded (1) that the death of the insured was not the result of accident and (2) that the death resulted from suicide.

A summary of the facts produced in evidence is pertinent.

There is no substantial conflict in the evidence. The body of the insured was found by his wife (petitioner) on a Monday about four o'clock in the afternoon submerged

in water in the lily pond in the back yard or garden of his home. Apparently death had occurred about six o'clock in the morning. The cause of death was drowning.

The evidence discloses no facts which support accidental death except conjecturally or speculatively. In other words, to justify accidental death one must say, as respondent would have us believe, that the insured went to the pool, between five o'clock and six o'clock in the morning under irrational if not unbelievable circumstances, to work with the lilies and other flowers in the pool and, having lost his balance, fell in and drowned. Upon the other hand, there is direct evidence, which was offered by petitioner, that the fact and manner of death resulted from premeditated self-destruction—that insured intended to destroy himself in a manner which must appear to be accidental—as disclosed by the suicide note which insured left on a table in the living room just after leaving his wife's bed-room (between five o'clock and six o'clock in the morning) and immediately before leaving the house and going to his death. This suicide note, in addition to disclosing self-destruction intent, and saying that death must appear to be accidental in order that accidental death benefit insurance could be collected, is buttressed by facts and circumstances showing provocation and motive. Several months before the insured lost an important executive position which paid him a considerable salary after which time he had had no substantial employment. His finances had dwindled to the extent that his money was gone—his bank account was overdrawn, numerous checks were outstanding, having been returned unpaid by the bank; he had borrowed on his insurance to its full loan value and insurance premiums were being paid monthly or quarterly. On Friday preceding his death he sought to borrow from his former employer. On Saturday evening preceding the Monday of his death, insured and his wife had an acrimonious dispute which resulted in insured leaving his home to which he did not return until Monday

morning, he having remained away all of Saturday night, all day Sunday and all of Sunday night, during which time or a considerable part of it he spent in a gambling house. Arriving at his home direct from a gambling house on Monday morning at about five o'clock, he went to his wife's bed-room. He sat in a chair for several minutes during which time, although the wife was awake and knew of his presence, she gave him no sign of recognition and no words were spoken. Fully dressed, the insured abruptly left the room, went down stairs and out the front door. All of this respondent knew, and she knew that, on leaving, insured did not drive away in his automobile, standing at the side of the house, in which he had returned home a short time before. At about nine o'clock when respondent came down stairs she was given the suicide note by her small son who had preceded her, he having found it on a small table in the living room. After reading the note, she sought to destroy it and went about her usual affairs at home and in trips down-town. As stated, she discovered the body in the pool about four o'clock in the afternoon.

It is shown in evidence that neighbors previously had observed the insured at the pool of mornings. Thereby we are asked to believe that decedent went to the pool as a usual incident in his every day life. One neighbor only saw him at the pool at any time and she says she had seen him there at around seven-thirty—between seven o'clock and eight o'clock—in the morning. She does not say she saw him many times at the pool in the morning; but she does say she never saw him there before around seven-thirty o'clock although she is up and around by five-thirty. We are asked to believe that, after having been away from home all of Saturday night, all of Sunday and all of Sunday night, in and around a gambling house, having arrived at his home at about five-thirty in the morning where he met with the utterly cold and unfeeling reception at the hands of petitioner, and after having

deposited the suicide note on the small table in the living room, the insured, at that early hour, went to the lily pond to change the location of the cat-tails.

We are told that a chip off the portable concrete steps was found. This is urged to support the conjecture that insured stepped upon the portable concrete steps, lost his balance, and in striking the side of the pool a piece of concrete was "chipped" off the steps. But this "chip" was not in the pool where it must have been if it had been "chipped off" in the manner counsel would have us believe. It was on the bank near the pool, outside the pool. This is conclusive that it was not "chipped off" at the time and in the manner counsel theorize. We must remember that, according to the suicide note, what happened to insured must be an accident, and we must assume that in everything he did at and in going into the pool insured had this in mind. Again, would the insured have been in the position his body was found if he had fallen? Would there not have been evidence of a struggle, the flowers disarranged?

We cannot ignore the quarrel between the insured and petitioner on Saturday night preceding the death of the former. The language used by petitioner does not correctly indicate what happened, and we insist that our detail of what occurred upon that occasion is correct from the transcript of the evidence. To our mind what occurred is significant. It was not the mild affair which counsel would have us believe. Petitioner on direct examination tells us what happened in language which indicates a climax had been reached in the life of the insured; the suicide note speaks more plainly.

Insured's financial plight cannot be minimized. It is true that after having been let out of his employment with the coal company he had some sort of agency with a Dictaphone Company, and that at the time of his death he was

about to become connected with a concern engaged in selling some sort of income certificates or contracts. But there is no evidence that insured had made any sales or had any income from any source since his discharge by the coal company as of February 28th. He was paid his salary for March and April. He borrowed against his insurance early in June. He had had cashed by individuals several checks which had been returned by the bank. These amply account for his deposits in bank. But the fact remains that he was out of funds. His finances were becoming more desperate each succeeding day.

It is said that the suicide note was a "scare" note and reference may be made to testimony as to other threats which is not in the evidence. But petitioner did not regard it as a "scare" note. At p. 118, transcript, out of the hearing of the jury, petitioner said, speaking of the suicide note in evidence, that "It worried me and I was really afraid that it might really be a suicide note". Whatever "scares" she had had previously, if any, petitioner felt that insured meant every word that he said in the note.

VII

In her petition (pp. 10-11), and in the brief of counsel subjoined thereto (p. 14), the petitioner sets forth the questions involved, the reasons why writs of certiorari should be granted to review these judgments, and a summary of argument, all of which embrace the same propositions. Our position, as stated above, is (1) that the burden of proof was upon the petitioner to show death from accident wherein she wholly failed, having shown that the death of the insured resulted from suicide, and, (2) that being true, it was the duty of the court to have directed a verdict for each of the respondents — from the evidence there was no question of fact for the jury to pass upon; or, having permitted the case to go to the jury, and the jury having found adverse to suicide, it was the duty of

the court to set aside the verdicts and enter judgment for each of the respondents in conformity to the evidence of suicide.

1. The burden of proof was upon petitioner and her evidence explains that the cause of death was suicide.

The question at issue is whether the insured met his death from accident. These cases were tried upon pleadings and proof. In the former respondents denied that insured's death was caused from accident, and while they also set up that death was by suicide, this plea added no defensive merit — it only amounted to a denial that death was of the sort insured against. New York Life Ins. Co. v. Gamer, 303 U. S. 161, 82 L. ed. 726 (730); Travelers' Ins. Co. v. Wilkes, 76 F. (2d) 701.

Another distinction which is most pertinent is that the rule of evidence as to presumptions and burden of proof is different in actions upon double indemnity and accident insurance policies than in actions to recover upon life insurance policies. This is clearly stated in Jefferson Standard Life Ins. Co. v. Clemmer, 79 F. (2d) 724. Therein the court said:

> "The differences that have arisen as to which party bears the burden of persuasion in insurance cases, when the defense is based on suicide, have been caused in part by a failure to distinguish between cases in which the plaintiff sues on an accident insurance policy or the double indemnity clause of a life insurance policy, and cases in which the insurer in a life policy raises the defense of suicide. If death from any cause except suicide is insured against (as in a life policy), the burden is on the company to prove the exception; but if death from one specific cause, such as an accident, is insured against, the burden is on the policy holder to show that the condition precedent to liability has taken place."

This distinction is recognized and followed in West Virginia. In Goodbar v. Western & Southern Life Ins. Co. 89 W. Va. 221, 108 S. E. 896, the suit was upon a life insurance policy, and the court held that, in a suit upon a life insurance policy, where defendant relies upon a provision defeating recovery if the insured dies from suicide, the burden is upon the company to show suicide by clear and satisfactory evidence, and where the evidence relied upon is circumstantial, suicide must be shown to the exclusion of every reasonable hypothesis consistent with death from natural causes. To the same effect is Tabor v. Mutual Life Ins. Co. 13 F. (2d) 765—4th Circuit; also, McDaniel v. Metropolitan Life Ins. Co. 195 S. E. (W. Va.) 597. These cases are cited and quoted from by counsel for petitioner in their brief (pp. 16-17) and are their main reliance.

But in Martin v. Mutual Life Ins. Co. 106 W. Va. 533, an action upon a policy providing for payment in the event of death through external, violent and accidental means, the court said:

> "In an action upon a policy insuring against death resulting solely from external, violent and accidental means, the burden rests upon the plaintiff, in the first instance, to make out a prima facie case showing that the death resulted solely from external, violent and accidental means."

In other words, the distinction as to burden of proof in West Virginia, in cases upon life policies on the one hand, and accident and double indemnity policies upon the other, is precisely the same as announced in the Clemmer case, supra.

Therefore, the cases of Goodbar v. Ins. Co. and Tabor v. Ins. Company, supra, having been actions upon life policies, are not applicable here.

Having seen that in actions upon policies such as we have here the burden is upon the plaintiff to show accidental death, the next inquiry is what degree of proof does this burden impose? In the Martin case, supra, the West Virginia court says:

> "The plaintiff made out a prima facie case when she introduced proof establishing the death of Martin (the insured) by external and violent means. The proof of death by such means raised a presumption that the insured's death was accidental."

The foregoing, while adhered to in principle, was qualified by the West Virginia court in Beckley Bank v. Provident Life & Accident Ins. Co., 2 S. E. 2d (W. Va.) 256, in the following language:

> "When death occurs from *unexplained* violent and external means, an accident may be presumed; but the presumption is excluded when the cause of death is shown. The opinion in Martin v. Mutual Life Ins. Co. 106 W. Va. 533, on page 540, 146 S. E. 53, is qualified."

In the opinion in the case last cited, the court goes on to say:

> "Plaintiff takes the position that when death is shown to have occurred from external and violent means, even gunshot wounds, an accident will be presumed. Unfortunately, our case of Martin v. Mutual Life Ins. Co. 106 W. Va. 533, 540, 146 S. E. 53, supports that position without qualification. The better rule, as stated in one of the citations in the Martin case, is ' * * * * * * where death by *unexplained* violent external means is established, prima facie proof is thereby made of the fact that the injuries were accidental * * * * * * ' 9 Ann. Cas. 919. Here the cause of death was explained. There was no place for presumption; the case must be judged on the facts.

Burge v. Wabash R. Co. 244 Mo. 76, 95, 148 S. W. 925; Dwight v. Hazlett, 107 W. Va. 192, 147 S. E. 877, 66 A. L. R. 102; First Nat. Bank v. Tri-State Equipment & Repair Co. 108 W. Va. 686, 152 S. E. 635; Jones Comm. on Ev. (2d ed.) Section 32 on p. 62."

This presumption, however, is not evidence and does not change the burden of proof. Travelers' Ins. Co. v. Wilkes, 76 F. (2d) 701; Jefferson Standard Life Ins. Co. v. Clemmer, 79 F. (2d) 724; McDaniel v. Metropolitan Life Ins. Co., 195 S. E. (W. Va.) 597 (599). The West Virginia Court, in citing with approval and quoting from New York Life Ins. Co. v. Gamer, 303 U. S. 161, 82 L. ed. 726, said:

> "Courts have frequently remarked that presumptions are only intended to take the place of facts, and cannot be relied upon where the facts are shown; or that no presumption can stand in the face of facts. According to such authorities a presumption is an artificial thing, a mere house of cards, which one moment stands with sufficient force to determine an issue, but at the next, by reason of the slightest rebutting evidence, topples utterly out of consideration of the trier of facts."

Applying these rules of law, we now come to a consideration of their application to the facts in these cases. We have seen that the burden was upon the petitioner to show the condition precedent to liability—that the insured met his death from accident. But petitioner produced direct evidence of suicide. Thereby she toppled "utterly out of consideration" any presumption of accidental death and relieved the respondents of the "slightest rebutting" evidence. In other words, the presumption of accidental death is not present in this record, for the reason that petitioner's evidence consists of facts—the suicide note and the circumstances attendant thereto—which show death from suicide. There was no presumption of accident for respondents to rebut. Petitioner's evidence, involving the suicide note —

its significant wording, its background, to say nothing of respondent's evidence, as a part of that background which is in harmony with petitioner's evidence, negatives any presumption of accidental death, and none can be read into the record in these cases.

2. Since the evidence shows that the insured came to his death by suicide, it was the duty of the court to direct a verdict in favor of these respondents.

Petitioner in her brief argues that the Circuit Court of Appeals—its judgment and opinion—has denied trial by jury, has drawn its own inferences from the evidence contrary to the verdict of the jury and has substituted its own opinion of the evidence for the verdict of the jury. As stated above, upon the evidence it was the duty of the court to take these cases from the jury by directing verdicts in favor of respondents. In every law action where the controlling facts which appear from the evidence are such that a verdict adverse to such facts should be set aside, it is the duty of the court, as a matter of law, to direct a verdict in conformity to those facts. In such cases there is no denial of trial by jury or of substitution of the opinion of the court for the verdict of the jury. The jury are the triers of the facts, but where there are no facts in dispute or where the evidence plainly preponderates in favor of a party, it becomes the duty of the court to take the case from the jury by directing a verdict; and if the trial court fails to do so, the appellate court will correct his error.

We do not conceive this to be a question of local law. It is one of Federal practice and we do not deem it necessary to cite and quote from authorities in support of the proposition that under the Federal practice the appellate court will do what the Circuit Court did herein — reverse the District Court with direction to enter judgment in conformity to the law and the evidence. Rule 50, Rules of Civil Procedure.

Such is the law in West Virginia.

In White v. Hoster, 51 W. Va. 259 (dec. 1902), the court said:

> "The Circuit Court commits no reversible error in instructing a jury to find for a party in whose favor the evidence plainly and decidedly preponderates."

At page 261 the court uses this language:

> "There is no question but that if a verdict had been returned on the evidence, it would have been the duty of the court to set it aside, because opposed to the plain and decided preponderance of the evidence. Although the rule prevails in the United States courts and in a majority of state courts that in such a case a verdict should be directed when asked, it has not heretofore been adopted in this state. * * * The question is now presented whether this court should follow the development of the law slowly crystalizing around the majority rule, sustained as it is by reason or justice, or still cling to the antiquated theories of the minority rule through fear of invading the province of the jury. Shall the court in a plain case be compelled to sit still and permit a jury to bring in a verdict contrary to the plain and decided preponderance of the evidence, and then set it aside and be compelled to repeat the farce of a new trial? Or shall the court follow the settled practice of the courts of the United States and direct a verdict against the party in whose favor the evidence does not warrant a verdict. 'The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the province of the court and jury, and fixes where it belongs the responsibility which should be assumed by the court.' Merchants Nat. Bank v. State Nat. Bank, 10 Wall. 604; Schuyler v. Munson, 14 Wall. 442'."

In the recent case of Acree v. Eureka Pipe Line Co. 8 S. E. (2d) 186 (189), the West Virginia court said:

> "It is well settled in this state that where the evidence plainly and decidedly predominates in favor of a party, it is not error for a trial court in a law action to give a peremptory instruction in that party's favor. White v. Hoster, 51 W.Va. 259, 41 S. E. 180; Bank v. Lynch, 93 W. Va. 382, 388, 116 S. E. 685."

Again in Ashbaugh v. Railway Co. 72 W. Va. 765 (772):

> "It is the duty of the trial court, when the evidence of the plaintiff is insufficient to sustain a verdict in his favor, or when a verdict in his favor would be contrary to the law and the evidence, to direct a verdict in favor of the defendant, if requested so to do" (citing cases).

If the trial court fails to take the case from the jury, when the evidence preponderates in favor of a party and direct a verdict in conformity therewith, the appellate court will do so.

In Fuccy v. Ry. Co. 75 W. Va. 134, the Supreme Court of West Virginia, in reversing the trial court, said:

> "Notwithstanding sufficiency of the evidence to warrant instructions for both parties, the verdict should be set aside, if it is not sustained by evidence sufficient in law, or if it is contrary to the decided weight and preponderance of the evidence. Jaeger v. Ry. Co. 72 W. Va. 307."

See, Dexter, etc. v. Fuel Co. 90 W. Va. 465 (470); Owen v. Power Co. 78 W. Va. 596 (609).

In Marshall v. Conrad, 118 W. Va. 321 (327):

> "The evidence does not sustain the verdict. On writ of error, a verdict against the plain preponderance of the evidence should be set aside."

Counsel argue that the Circuit Court substituted its own opinion of the evidence for that of the jury and drew its own inferences from the evidence contrary to the verdict of the jury; and they cite and quote from numerous authorities in the premises. This argument and these authorities are not pertinent for the reason that they are applicable only in cases where there is a conflict in the testimony. Here the petitioner's case must be judged by her own evidence, and this evidence precludes recovery in her favor because it establishes suicide. Respondent's evidence merely supplements that of petitioner; it is not in conflict therewith.

We submit that the Writs of Certiorari prayed for by the petitioner should be denied.

Respectfully submitted,

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